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BEFORE THE
BOARD OF ACCOUNTANCY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

10 In the Matter of the Accusation) No.: AC-95-11
11 Against:)
12 JACK D. KELLY)
13 582 Market Street, #216)
14 San Francisco, CA 94104)
15 California Certified Public)
16 Accountant Certificate #7370)
17 Respondent.)
18)
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18 Carol Sigmann, as cause for discipline alleges:

19 1. She is the Executive Officer of the State Board of
20 Accountancy, Department of Consumer Affairs, State of California,
21 and files this Accusation in her official capacity as such.

22 2. On September 22, 1958, the Board of Accountancy
23 (hereafter referred to as Board) issued certified public
24 accountant certificate No. 7370 to Jack D. Kelly (hereafter
25 referred to as respondent). Said certificate is currently in
26 full force and effect and expires, subject to renewal, November
27 1, 1995.

1 3. Business and Professions Code section 5100
2 provides, in pertinent part, that the Board may revoke, suspend,
3 or refuse to renew any permit or certificate granted under
4 Article 4 (commencing with section 5070) and Article 5
5 (commencing with section 5080), or may censure the holder of that
6 permit or certificate for unprofessional conduct which includes
7 but is not limited to one or any combination of the following:

8 "... (c) dishonesty, fraud, or gross negligence in the
9 practice of public accountancy or in the performance of
10 the bookkeeping operations described in Section 5052.

11 (f) wilful violation of this chapter or any rule or
12 regulation promulgated by the Board....

13 (h) fiscal dishonesty or breach of fiduciary
14 responsibility of any kind..."

15 4. Business and Professions Code section 5107 provides
16 in pertinent part: "The executive officer of the Board may
17 request the Administrative Law Judge, as part of the proposed
18 decision in a disciplinary proceeding, to direct any holder of a
19 permit or certificate found guilty of unprofessional conduct
20 . . . to pay to the Board all reasonable costs of investigation
21 and prosecution of the case, including attorney's fees."

22 5. Title 16, California Code of Regulations,
23 Section 68 provides, in pertinent part, that a licensee of the
24 Board, after demand by or on behalf of a client, for books,
25 records or other data, whether in written or machine sensible
26 form, that are the client's records shall not retain such
27 records.

1 6. Title 16, California Code of Regulations,
2 Section 69.1 provides, in pertinent part, that wilful failure or
3 refusal by a licensee to comply with a written notice, of the
4 Certified Public Accountants Administrative Committee..., to
5 appear in person before such Committee pursuant to section 5020
6 or Section 5020.3 of the Accountancy Act, constitutes a violation
7 of Section 5100 (f) of the Accountancy Act.

8 7. Title 16, California Code of Regulations,
9 Section 87, provides in pertinent part, that a licensee shall not
10 engage in public practice as defined in Business and Professions
11 Code section 5051 or any activities referred to in Rule 5, in
12 California, unless during the two-year period immediately
13 preceding permit renewal the licensee has completed at least 80
14 hours of qualifying continuing education and submitted the
15 statement required by Section 89.

16 JOHN ATTERBURY

17 8. Respondent prepared Mr. John Atterbury's 1987 and
18 1988 tax returns and represented Mr. Atterbury in an IRS audit of
19 both years' returns. As a result of the audit, notices of
20 deficiency were issued. Respondent told Mr. Atterbury that the
21 "IRS was wrong" and that respondent would file a "Claims for
22 Refunds" (amended returns). Mr. Atterbury called the respondent
23 on numerous occasions and was told by the respondent that Mr.
24 Atterbury "did not owe the tax" and that respondent would "take
25 care of the notices". However, respondent did not file any
26 appeal of the assessed taxes, and instead Mr. Atterbury's 1991
27 tax refund in the amount of \$566 was applied against the 1987

1 outstanding balance, and in July of 1992, Mr. Atterbury received
2 a final notice from the IRS requesting payment in the amount of
3 \$905.10 for the 1987 deficiency, which Mr. Atterbury paid. Mr.
4 Atterbury also received a Notice of Intent to Levy in the amount
5 of \$2,436 dollars owed as a result of the deficiencies and
6 penalties owed from the 1988 tax return.

7 9. Respondent has subjected his license to discipline
8 under Business and Professions Code section 5100 (c) in that he
9 was grossly negligent in the preparation of Mr. Atterbury's 1987
10 tax return in that he failed to properly calculate car and truck
11 expenses and failed to properly assess Mr. Atterbury's
12 entertainment expenses.

13 10. Respondent has subjected his license to discipline
14 under Business and Professions Code section 5100 (c) in that he
15 was grossly negligent in the preparation of Mr. Atterbury's 1988
16 tax return in that he failed to properly calculate car and truck
17 expenses and failed to determine whether the travel claimed on
18 the 1988 return was business related.

19 11. Respondent has subjected his license to discipline
20 under Business and Professions Code section 5100 (h) in that he
21 breached his fiduciary duty to Mr. Atterbury when he failed to
22 file an appeal or file amended returns with the IRS as promised.

23 THEODORE MASON

24 12. In early 1988, Mr. Theodore Mason provided
25 respondent with his tax records for the preparation of a 1987 tax
26 return. Mr. Mason received several notices from the IRS
27 indicating that his 1987 tax return was not filed. From

1 approximately 1989 to 1992, Mr. Mason made repeated requests to
2 respondent for the return of his tax records. However,
3 respondent failed to return Mr. Mason's tax records or return a
4 prepared tax return until October 26, 1992.

5 13. Respondent has subjected his license to discipline
6 under Business and Professions Code section 5100 (f) in
7 conjunction with Title 16, California Code of Regulations,
8 Section 68 in that he retained Theodore Mason's tax records and
9 did not timely return them upon demand by Mr. Mason.

10 14. Respondent has subjected his license to discipline
11 under Business and Professions Code section 5100 (c) in that he
12 was grossly negligent in failing to timely prepare Mr. Mason's
13 1987 tax return.

14 15. Respondent has subjected his license to discipline
15 under Business and Professions Code section 5100 (f) in
16 conjunction with Title 16, California Code of Regulations,
17 Section 69.1, in that he failed to appear before the
18 Administrative Committee of the State Board of Accountancy on
19 April 28, 1994, and July 14, 1994.

20 FIELD INVESTIGATION

21 16. On or about December 9, 1993, Board Investigator,
22 Thomas Rackerby conducted a field investigation at respondent's
23 office located at 582 Market Street, #216, San Francisco,
24 California.

25 17. Respondent subjected his license to discipline
26 under 5100 (f) in conjunction with Title 16, California Code of
27 Regulations, section 87 in that during the field inspection,

1 Board Investigator Thomas Rackerby, requested evidence of
2 respondent's continuing education for the period of November 1,
3 1991 to November 1, 1993; however, respondent only provided
4 evidence of having completed 79.25 hours of the required 80 hours
5 of continuing education.

6 PRAYER

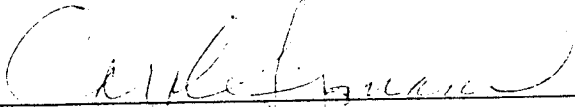
7 WHEREFORE, the complainant requests that a hearing be
8 held on the matters herein alleged, and that following said
9 hearing, a decision be issued:

10 1. Revoking or suspending Certified Public Accountant
11 Certificate Number 7370 heretofore issued to respondent;

12 2. Awarding the Board costs as provided by Business and
13 Professions Code section 5107; and

14 3. Taking such further action as the Board deems
15 proper.

16 DATED: March 30, 1995

17
18 
19 CAROL SIGMANN
20 Executive Officer
21 Board of Accountancy
22 Department of Consumer Affairs
23 State of California

24 Complainant

25 035110-SF94AD1398

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8 **BEFORE THE**
BOARD OF ACCOUNTANCY
DEPARTMENT OF CONSUMER AFFAIRS
9 **STATE OF CALIFORNIA**

10 In the Matter of the Accusation) NO. AC 95-11
11 Against:)
12 JACK D. KELLY) DEFAULT DECISION
582 Market Street, #216)
13 San Francisco, CA 94104) [Gov. Code §11520]
14 California Certified Public)
Accountant Certificate No. 7370)
15 Respondent.)
16

17 FINDINGS OF FACT

18 1. On or about March 30, 1995, Complainant Carol
19 Sigmmann in her official capacity as Executive Officer of the
20 Board of Accountancy, Department of Consumer Affairs State of
21 California (hereinafter "Board"), filed Accusation No. AC 95-11
22 against Jack D. Kelly. (hereinafter "respondent").

23 2. On or about April 6, 1995, Victoria Rivera, an
24 employee of the Office of the Attorney General, sent by certified
25 and regular mail a copy of Accusation No. AC 95-11, Statement to
26 Respondent, Government Code sections 11507.5, 11507.6, and
27 11507.7, Notice of Defense forms, and a Request for Discovery to
respondent's last address of record with the Board which was and

1 is 582 Market Street, #216, San Francisco, CA 94104. The
2 documents which were sent via regular mail to 582 Market Street,
3 #216, San Francisco, CA 94104 were not returned. The green
4 return receipt card of the documents sent via certified mail was
5 signed by "JD Kelly" and was returned to our office. The above-
6 described service was effective as a matter of law pursuant to
7 the provisions of California Government Code section 11505,
8 subdivision (c).

9 3. On September 22, 1958, the Board issued certified
10 public accountant certificate No. 7370 to Jack D. Kelley. Said
11 certificate is currently in full force and effect and expires,
12 subject to renewal, November 1, 1995.

13 4. Business and Professions Code section 118 provides,
14 in pertinent part:

15 "(b) The suspension, expiration, or forfeiture by
16 operation of law of a license issued by a board in the
17 department, or its suspension, forfeiture, or cancellation
18 by order of the board or by order of a court of law, or its
19 surrender without the written consent of the board, shall
20 not, during any period in which it may be renewed, restored,
21 reissued, or reinstated, deprive the board of its authority
22 to institute or continue a disciplinary proceeding against
23 the licensee upon any ground provided by law or to enter an
24 order suspending or revoking the license or otherwise taking
25 disciplinary action against the license on any such ground."

26 5. Government Code section 11506 provides, in
27 pertinent part:

"(b) The respondent shall be entitled to a hearing on

1 the merits if he files a notice of defense, and any such
2 notice shall be deemed a specific denial of all parts of the
3 accusation not expressly admitted. Failure to file such
4 notice shall constitute a waiver of respondent's right to a
5 hearing, but the agency in its discretion may nevertheless
6 grant a hearing"

7 6. Respondent failed to file a Notice of Defense
8 within 15 days after service upon him of the Accusation and
9 therefore waived his right to a hearing on the merits of
10 Accusation No. AC 95-11.

11 7. Government Code section 11520 provides, in
12 pertinent part:

13 "(a) If the respondent fails to file a notice of
14 defense or to appear at the hearing, the agency may take
15 action based upon the respondent's express admissions or
16 upon other evidence and affidavits may be used as evidence
17 without any notice to respondent;"

18 8. Pursuant to its authority under Government Code
19 section 11520, and based on the evidence before it, the Board
20 finds that the following allegations contained in the Accusation
21 No. AC-95-11 are true:

22 A. Respondent prepared Mr. John Atterbury's 1987 and
23 1988 tax returns and represented Mr. Atterbury in an IRS audit of
24 both years' returns. As a result of the audit, notices of
25 deficiency were issued. Respondent told Mr. Atterbury that the
26 "IRS was wrong" and that respondent would file a "Claims for
27 Refunds" (amended returns). Mr. Atterbury called the respondent
on numerous occasions and was told by the respondent that Mr.

1 Atterbury "did not owe the tax" and that respondent would "take
2 care of the notices". However, respondent did not file any
3 appeal of the assessed taxes, and instead Mr. Atterbury's 1991
4 tax refund in the amount of \$566 was applied against the 1987
5 outstanding balance, and in July of 1992, Mr. Atterbury received
6 a final notice from the IRS requesting payment in the amount of
7 \$905.10 for the 1987 deficiency, which Mr. Atterbury paid. Mr.
8 Atterbury also received a Notice of Intent to Levy in the amount
9 of \$2,436 dollars owed as a result of the deficiencies and
10 penalties owed from the 1988 tax return.

11 B. In early 1988, Mr. Theodore Mason provided
12 respondent with his tax records for the preparation of a 1987 tax
13 return. Mr. Mason received several notices from the IRS
14 indicating that his 1987 tax return was not filed. From
15 approximately 1989 to 1992, Mr. Mason made repeated requests to
16 respondent for the return of his tax records. However,
17 respondent failed to return Mr. Mason's tax records or return a
18 prepared tax return until October 26, 1992.

19 C. On April 28, 1994, and July 14, 1994, respondent
20 failed to appear before the Administrative Committee of the State
21 Board of Accountancy.

22 D. On or about December 9, 1993, Board Investigator,
23 Thomas Rackerby conducted a field investigation at respondent's
24 office located at 582 Market Street, #216, San Francisco,
25 California. During the field inspection, Board Investigator
26 Thomas Rackerby, requested evidence of respondent's continuing
27 education for the period of November 1, 1991 to November 1, 1993;
however, respondent only provided evidence of having completed

1 79.25 hours of the required 80 hours of continuing education.

2

3 DETERMINATION OF ISSUES

4 1. Respondent is subject to disciplinary action
5 pursuant to Business and Professions Code section 5100 (c) in
6 that respondent was grossly negligent in the preparation of Mr.
7 Atterbury's 1988 tax return due to respondent's failure to
8 properly calculate car and truck expenses and his failure to
9 determine if the travel claimed was business related, by reason
10 of the Finding of Facts numbers 1 through 8 A, above.

11 2. Respondent is subject to disciplinary action
12 pursuant to Business and Professions Code section 5100 (h) in
13 that he breached his fiduciary duty to Mr. Atterbury when
14 respondent failed to file an appeal or amended returns with the
15 IRS as promised, by reason of Finding of Facts numbers 1 through
16 8 A.

17 3. Respondent is subject to disciplinary action
18 pursuant to Business and Professions Code section 5100 (f) in
19 conjunction with Title 16, California Code of Regulations,
20 section 68 in that he failed upon demand to return Theodore
21 Mason's tax records, by reason of the Finding of Facts numbers 1
22 through 8 B, above.

23 4. Respondent is subject to disciplinary action
24 pursuant to Business and Professions Code section 5100 (c) in
25 that he was grossly negligent in failing to timely prepare Mr.
26 Mason's 1987 tax return, by reason of Finding of Facts numbers 1
27 through 8 B.

5. Respondent is subject to disciplinary action

1 pursuant to Business and Professions Code section 5100 (f) in
2 conjunction with Title 16, California Code of Regulations,
3 section 69.1, in that he failed to appear before the
4 administrative committee, by reason of Finding of Facts numbers 1
5 through 8 C.

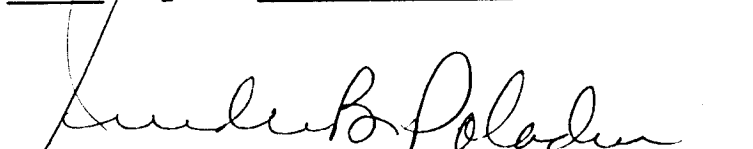
6 6. Respondent is subject to disciplinary action
7 pursuant to Business and Professions Code section 5100 (f) in
8 conjunction with Title 16, California Code of Regulations,
9 section 87, in that he failed to provide a Board Investigator
10 evidence of having completed the entire 80 hours of required
11 continuing education, by reason of Finding of Facts numbers 1
12 through 8 D.

13
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15 ORDER OF THE BOARD

16 California Certified Public Accountant Certificate No. 7370
17 heretofore issued to respondent Jack D. Kelly, is hereby revoked.
18 An effective date of September 6 1995, has been assigned to this
19 Order.

20 Pursuant to Government Code section 11520, subdivision
21 (b), respondent is entitled to make any showing by way of
22 mitigation prior to the effective date of this decision.

23 Made this 7th day of August, 1995.

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25 
26 FOR THE BOARD
27